

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JIMMY BUCKMAN,

Plaintiff,

v.

JO ANNE B. BARNHART,  
Commissioner of Social  
Security,

Defendant.

No. 04-CV-3106-MWL

ORDER GRANTING PLAINTIFF'S  
MOTION TO AMEND JUDGMENT AND  
REMANDING FOR AN IMMEDIATE  
AWARD OF BENEFITS

Before the court is Plaintiff's motion to amend its judgment pursuant to Federal Rule of Civil Procedure (FRCP) 59(e). (Ct. Rec. 22). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 6). Defendant did not respond to Plaintiff's motion to amend, even after she was contacted by Court staff regarding the instant motion. After considering the Plaintiff's motion and memorandum, the court **GRANTS** Plaintiff's motion and remands the matter to the Commissioner for an immediate award of benefits.

I. Background

On August 19, 2005, this court entered an order granting Defendant's Motion for Summary Judgment and denying Plaintiff's Motion for Summary Judgment. (Ct. Rec. 20). The court held,

1 among other things, the ALJ's determination at step five was  
2 supported by the evidence of record. (Ct. Rec. 20, p. 10).  
3 Plaintiff requests the court amend its judgment pursuant to FRCP  
4 59(e) because the ALJ based his step five finding on a clear error  
5 made by the testifying Vocational Expert (VE). (Ct. Rec. 23-1, p.  
6 11). Therefore, the court's affirmation of the ALJ decision  
7 should be reconsidered in light of the VE's manifest clerical  
8 error.

9 The ALJ found Plaintiff had the residual functional capacity  
10 to perform "light" work "not requiring lifting and carrying more  
11 than 20 pounds occasionally and 10 pounds frequently, sitting more  
12 than six hours in an eight hour day and standing and/or walking  
13 more than six hours in an eight hour day. Additionally the  
14 claimant is limited to occasional reaching with his upper  
15 extremities." (Tr. 23)(Emphasis added). When asked by the ALJ if  
16 there were any jobs in the national economy that the Plaintiff  
17 could perform, the VE testified there was only one, that of Order  
18 Caller. After referring to his notes, the VE testified that this  
19 job required occasional reaching. Other unskilled, light work  
20 required frequent reaching. (Tr. 303-04.)

## 21 II. ISSUES

22 The issues presented are: (1) whether the court should amend  
23 its judgment due to erroneous testimony by the VE, and (2) whether  
24 the case should be remanded to the Commissioner for an immediate  
25 award of benefits. Plaintiff contends the VE's mistake is error  
26 on the face of the evidence, and the Commissioner failed to meet  
27 her burden of identifying any job Plaintiff could perform.  
28 Defendant did not respond to Plaintiff's argument.

1  
2 III. DISCUSSION

3 Motions to amend or alter a judgment must be filed within 10  
4 days of entry of the judgment. FRCP 59(e). Plaintiff timely  
5 filed his motion to alter the judgment. FRCP 6. A motion to  
6 amend or alter a judgment is appropriate to correct clear errors,  
7 to present newly discovered evidence, or to rectify an initial  
8 decision that was "manifestly unjust." *Circuit City Stores, Inc.*  
9 *v. Mantor*, 417 F.3d 1060 (9<sup>th</sup> Cir. 2005).

10 Plaintiff is not disputing the ALJ's residual functional  
11 capacity (RFC) determination. (Ct. Rec. 23-1, p. 3). Rather, he  
12 contends that the ALJ based his step five finding on VE testimony  
13 that is not supported by information in the *Dictionary of*  
14 *Occupational Title (DICOT)*, which is considered the best source  
15 for how a job is generally performed. See *Pinto v. Massanari*, 249  
16 F.3d 840, 846 (9<sup>th</sup> Cir. 2001) (*citations omitted*). Plaintiff also  
17 argues that even if the VE knowingly contradicted the *DICOT*, he  
18 did not provide the required testimony explaining an inconsistency  
19 with the *DICOT*. *Id.*; see also *SSR 00-4p*. In support of his  
20 argument, Plaintiff provides the court with a copy of the *DICOT*  
21 job description for Order Caller, *DICOT* number 209.667-014.<sup>1</sup> *DICOT*  
22 explicitly indicates that the physical demands of an Order Caller  
23 include "frequent reaching." Clearly the VE made an error in his  
24 testimony that Order Caller required only occasional reaching.

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27 <sup>1</sup> The Commissioner did not respond to Plaintiff's Motion to  
28 Amend Judgment; therefore, the representations made in Plaintiff's  
Exhibit A are unrebutted.

1 Since the ALJ determined that Plaintiff was limited to only  
2 occasional reaching with his upper extremities, it is apparent  
3 that Plaintiff is incapable of performing the demands of the job  
4 of Order Caller. Moreover, because Order Caller is the only  
5 position previously identified as one which Plaintiff could  
6 perform, and Plaintiff cannot perform this job, there are no other  
7 positions in the national economy which Plaintiff can perform. As  
8 a result, the ALJ's step five finding is not based on substantial  
9 evidence and Defendant has not met her step five burden. See *Kail*  
10 *v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup> Cir. 1984).

11 The decision to remand a case for an immediate award of  
12 benefits is within the discretion of the court. *Winans v. Bowen*,  
13 853 F.2d 643, 647 (9<sup>th</sup> Cir. 1987). The Plaintiff has shown the  
14 VE's erroneous testimony renders the ALJ's step five finding  
15 unsupported by substantial evidence. Accordingly,

16 **IT IS ORDERED:**

17 1. Plaintiff's Motion to Amend Judgment (**Ct. Rec. 22**) is  
18 **GRANTED** for the reasons discussed above.

19 2. The court's Order Granting Defendant's Motion for Summary  
20 Judgment and Judgment in favor of Defendant (**Ct. Rec. 20, 21**) are  
21 **REVERSED**. Defendant's Motion for Summary Judgment (**Ct. Rec. 16**) is  
22 **DENIED**.

23 3. Plaintiff's Motion for Summary Judgment is **GRANTED** (**Ct.**  
24 **Rec. 12**). The case is remanded to the Commissioner for an  
25 immediate award of benefits.

26 4. Judgement for the Plaintiff shall be entered. An  
27 application for attorney fees may be filed by separate motion.

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s/MICHAEL W. LEAVITT  
UNITED STATES MAGISTRATE JUDGE